NO. 92-371

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RONNIE DEAN BARNES,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Superior Court err in denying the Motion of Defendant Barnes to suppress certain evidence obtained from a 1987 Plymouth Horizon under authority of a search warrant unsupported by probably cause?

2. Did the Superior Court err in denying the Motion of Defendant Barnes to suppress evidence obtained from him pursuant to a search warrant which was not supported by probable cause?

PARTIES TO THE PROCEEDING

Ronnie Dean Barnes,

Petitioner,

State of North Carolina,

Respondent.

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ASSIGNMENTS OF ERROR

1. The Superior Court erred in denying the Motion of Defendant Barnes to suppress certain evidence obtained from a 1987 Plymouth Horizon under authority of a search warrant unsupported by probable cause.

2. The Superior Court erred in denying the Motion of Defendant Barnes to suppress evidence obtained from him pursuant to a search warrant which was not supported by probable cause.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1257.

STATEMENT OF THE CASE

On August 7, 1989, the Forsyth County Grand Jury returned indictments, proper in form, which charged Defendant Ronnie Dean Barnes with the crimes of First-Degree Murder, First-Degree Burglary, and attempted First-Degree Arson.

Trial began before the Honorable Julius A. Rousseau, Jr., at the February 12, 1990 Criminal Session of Forsyth County Superior Court.

On February 21, 1990, the jury impaneled to try the case returned verdicts finding Defendant Barnes guilty of First-Degree Murder on a theory of premeditation and deliberation, First-Degree Burglary, and attempted First-Degree Arson. The Court thereupon proceeded to conduct a sentencing hearing, with regard to the conviction of first degree murder, as

provided by G.S. 15A-2000. On February 26, 1990, the jury unanimously recommended that the Defendant be sentenced to a term of life imprisonment. The Court thereupon sentenced the Defendant to a term of life imprisonment upon his conviction of First-Degree Murder; 40 years of imprisonment upon his conviction of First-Degree Burglary and 10 years imprisonment upon his conviction of attempted First-Degree Arson. All of the terms of imprisonment were to be served consecutively.

The Defendant gave oral Notice of Appeal to the Supreme Court of North Carolina on March 2, 1990. On April 10, 1991, the Defendant's Motion to Bypass the Court of Appeals with regard to his convictions of First-Degree Burglary and attempted First-Degree Arson was granted.

On June 4, 1993, the Supreme Court of North Carolina unanimously upheld the

Defendant's conviction.

STATEMENT OF THE FACTS

At trial, the State introduced evidence tending to show that, on December 26, 1988, the decedent, Bobby Douglas Winn, Jr., was living with his father in Winston-Salem. The decedent's father testified that he owned an establishment known as Bobby Sue's Lounge and that he operated a drywall installation company out of an office located in his house. According to Mr. Winn, there was a safe bolted to the floor of his office.

The decedent's father stated that he left home on the evening of December 26th and went to the bar. While there, he saw his son talking with Defendant Barnes. Although the two had fought approximately a year earlier, they seemed to be getting along that evening. Defendant Lemons was also seen at the lounge.

The decedent left the bar at

approximately 8:30 p.m., and Defendants Barnes and Lemons left a half-hour later.

At approximately 10:00 p.m., a woman friend told Mr. Winn that his car had flat tires. Rather than call his son for help, Mr. Winn sent one of his employees, James Overby, to his house to get an air compressor. Upon arriving at the house, Overby tried to rouse the decedent by knocking on the door. When he did not get any response, Overby used his key to go into the basement. According to Overby's testimony, he did not notice anything wrong at the Winn house while he was on the premises. Overby returned to the lounge approximately a half-hour later. As Mr. Winn was working on his car, he saw the Defendants return to the lounge in a black compact car. Mr. Winn found that the spare tires which he had were the wrong size. Instead of waking his son, the father went to the house to get

some spare tires between 10:30 and 11:00 p.m. He was accompanied by a friend, Edward Brewer. Both defendants purportedly left the bar shortly thereafter. When he arrived at his home at approximately 11:00 p.m., Mr. Winn did not notice anything out of the ordinary. When Mr. Winn returned to the lounge at approximately 11:30 p.m., the Defendants were gone. Mr. Winn did not leave the bar until shortly after midnight. Upon arriving home at approximately 12:30 a.m., he saw that the safe was in front of the house beside the street and that one of the doors to the basement had been broken open. A car in the carport had been damaged. Upon entering the house, Mr. Winn saw the lights on in his office. Furthermore, he saw a gas can in the den, as well as bullet holes in the walls. He found his son's body on the stairs leading to the second floor of the house. A subsequent

police investigation established that the front door and back door had been damaged. In addition, the office, as well as a bedroom, had been ransacked. There was blood found on the steps. In addition, a large yellow plastic jug was found in the den, and there was the smell of gasoline throughout the house. One of the bullets fired into the wall had been apparently fired from the stairs upon which the decedent was found. No fingerprints matching either of the defendants were found in the dwelling. Kenneth Fuller, an employee of Parkway Texaco Station, subsequently told a detective with the Winston-Salem Police Department that he had sold gasoline to Defendant Barnes between 9:30 p.m. and 10:00 p.m. on December 26. The attendant initially denied selling any gasoline to Defendant Barnes. However, after being falsely told that his fingerprints had been found on a can

found at the crime scene, he was able to recall the transaction. Brenda K. "Peaches" Baker saw a small black car in the vicinity of Mr. Williams' house between 10:30 and 11:00 p.m. on December 26th. She recalled seeing a confederate flag on the front of the vehicle. According to Ms. Baker, she saw two white males with a "white jug" in the car. One of the men apparently told her that they were out of gas. Ms. Baker saw the men walking toward Mr. Winn's house. At trial, Ms. Baker identified the two defendants as the men she had seen.

Ms. Kathy Long, Mr. Winn's next door neighbor, testified that she heard three "booms" or "bangs" between 11:15 p.m. and 11:30 p.m. on December 26th. Upon looking from her window, she saw nothing unusual at the Winn house.

According to the autopsy, the decedent

suffered gunshot and knife wounds. In the opinion of the pathologist, the decedent was shot first, and he was probably still alive when he was stabbed. The cause of death was a combination of the gunshot wound, and the loss of blood from the knife wounds.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING THE MOTION OF DEFENDANT BARNES TO SUPPRESS CERTAIN EVIDENCE OBTAINED FROM A 1987 PLYMOUTH HORIZON UNDER AUTHORITY OF A SEARCH WARRANT UNSUPPORTED BY PROBABLE CAUSE.

II. THE SUPERIOR COURT ERRED IN DENYING THE MOTION OF DEFENDANT BARNES TO SUPPRESS EVIDENCE OBTAINED FROM HIM PURSUANT TO A SEARCH WARRANT WHICH WAS NOT SUPPORTED BY PROBABLE CAUSE.

On January 5, 1989, Detective Kenneth Bishop of the Winston-Salem Police Department applied for a search warrant concerning a 1987 Plymouth Horizon registered to Pamela Renee Alderson. Blood not inconsistent with that of the decedent was found in the car.

When Detective Bishop applied for a search warrant, he had in his possession, a statement from Ms. Baker, taken by Detective Riggs on December 27, 1989. Detective Bishop modified that statement in several ways. First, while Ms. Baker told Detective Riggs

that the car she saw was a black Ford Mustang, Detective Bishop alleged that she had seen a "black 4-door subcompact car". While Ms. Baker's description of the car to Detective Riggs varied considerably from her in-court testimony about the appearance of the two men and from the description of other witnesses, Detective Bishop alleged that her description of the occupants was very favorable to the Defendants. Although Ms. Baker told Detective Riggs that the men she saw had a gas can, Detective Bishop alleged that she had said that the men were carrying "a plastic container" like the one found at the scene. Although Ms. Baker testified that she saw all of this between 10:30 p.m. and 11:00 p.m., Detective Bishop alleged that she saw all of this "shortly before midnight".

Defendants Barnes and Lemons moved, pursuant to pertinent provisions of the State

and Federal Constitutions, to suppress the results of the search, as well as for a hearing on the question of Detective Bishop's search warrant application. In particular, the Defendants alleged (1) that the affidavit did not establish probable cause; (2) that Detective Bishop acted in bad faith in making application for the search warrant; (3) that there was a break in the chain of custody concerning the car; (4) that the State's tests on the blood recovered from the vehicle had consumed all of the blood leaving none for defense examination; and, (5) that the probative value of the evidence derived from the blood tests was outweighed by its prejudicial impact.

At trial, the State asserted the position that Defendants had no standing to suppress the evidence on the ground that the vehicle was registered to Ms. Alderson. A hearing was

conducted on a narrow issue of standing, at which Ms. Alderson and both defendants testified. According to Ms. Alderson and Defendant Lemons, the car was used primarily by Defendant Lemons to store his tools and to provide transportation to and from work. Although Defendant Barnes usually drove Defendant Lemons' truck, he used the car on occasion. In addition, while Defendant Barnes testified that he did not have a key to the vehicle, Defendant Lemons would leave a key in it for him when he needed to use it. In fact, according to the testimony of Defendant Barnes, the keys were left in the car when he needed to switch the car for the truck. When the car was seized, his tools were in it.

Based upon the evidence heard at the hearing, the Trial Court entered the following order:

> All right, I'm going to find with respect to the possession of the

vehicle, that the vehicle that was seized was bought in April of 1987 by . . . Pam Alderson and her boyfriend [Robert Wilkes]; that at the time, the two of them were living together; that they separated sometime in July of 1988; that Mr. Lemons then moved in with the young lady; that his automobile was registered in the name of Mrs.[sic] Alderson and Mr. Wilkes.

That during the time that Mr. Lemons lived with her, late fall of 1988, she allowed Mr. Lemons to drive the automobile; that he drove it to and from work; that while at work he allowed Mr. Barnes to drive the vehicle; that the keys remained in the vehicle at all times; that at the time of the search, it was found at Mrs.[sic] Alderson's residence in her driveway.

The Court concludes that, even though both defendants used the vehicle from time to time, they had no right to expect privacy; therefore had no standing to protest the search.

The Court further concludes that, if they had standing to contest the search, that the search warrant is valid on its face; that there has been no showing that any statement in the search warrant was falsely made by intentionally and knowingly applying the facts that it was not in disregard to the truth. And even

> though there may be some discrepancies in the search warrant, considering the totality of the circumstances, the Court finds that the magistrate had probable cause to issue [the] search warrant and that the search is valid and any objects seized as a result of the search will be admissible in this trial.

It is respectfully contended by Defendant Barnes that the Trial Court was in error.

If there is no material conflict in the evidence, the Trial Court need not set out findings of fact and conclusions of law at a hearing held upon a motion to suppress. E.g. State vs. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980); insufficient findings where there has been a material conflict in the evidence amounts to prejudicial error. State vs. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983); State vs. Booker, 306 N.C. 302, 293 S.E.2d 78 (1982). In any event, when the evidence is conflicting and it is necessary to make specific findings in order to resolve such conflicts, the

findings of fact must be sufficient to provide a basis for the Court's ruling. E.g. State vs. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907 (1980). If the findings of fact made by the Trial Court are supported by competent evidence in the record, they are conclusive.

It is clear, from the findings of fact and conclusion of law made by the Trial Court that the crux of the Court's ruling was the perceived lack of standing on the part of Defendant Barnes. In order to have standing to object to a search, a defendant must have a legitimate expectation of privacy in the place to be searched. E.g. Minnesota vs. Olsen, 495 U.S. _____, _____ S.Ct. _____, 109 L.Ed.2d 85 (1990); Rawlings vs. Kentucky, 448 U.S. 98, ____ S.Ct. ____, 65 L.Ed.2d 633 (1980); Rakas vs. Illinois, 439 U.S. 128, ____ S.Ct. _____, 58 L.Ed.2d 387 (1978). In making the

determination whether a defendant has a legitimate expectation of privacy, it is improper for the Court to treat any single factor as being determinative. Rakas vs. Illinois, supra at 407, ____ S.CT. at _____, 58 L.Ed.2d at 153 (Powell, J., concurring). The courts have recognized that relevant factors on the issue of standing include common law property interest, possessory rights, legitimate use of the premises by the Defendant, the exclusiveness of the defendant's use of the premises, the right of a defendant to exclude other from the premises, and efforts on the part of a defendant to exclude others. See generally W. LaFave, Criminal Procedure, _____ (19____).

It was the position of the State that Defendant Barnes did not having standing to challenge the search because he had no legal title to the car. It would be a mistake to

hold that the absence of legal title is determinative of the question of standing. There are numerous instances in which a defendant, who did not have legal title to a vehicle, was found to have legal standing to challenge the search of the car. E.g. Pollard vs. State, 270 Ind. 599, 388 N.E.2d 496 (1979); United States vs. Burke, 506 F.2d 1165 (9th Cir. 1974). For example, defendants have been found to have standing to challenge searches performed in connection with vehicles and primacies where they had keys. State vs. Csolak, 571 S.W.2d 118 (Mo.App. 1978); State vs. Harms, 233 Neb. 882, 449 N.W.2d 1 (1989). The defendant's reasonable expectation of privacy is derived from his customary use of the car, with the knowledge and consent of its owner. Defendant Barnes drove it on a regular basis, it is the contention of Defendant Barnes that the Trial Court's findings of fact

were not supported by the evidence.

Furthermore, there is a serious question in this case concerning the truthfulness of statements made by Detective Bishop in connection with this application for a warrant. It is the position of Defendant Barnes that material misstatements by the officer render any subsequent search invalid.

When a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in an affidavit supporting an application for a search warrant, the Fourth Amendment requires that a hearing be held to determine the validity of the warrant which was subsequently issued. Franks vs. Delaware, 438 U.S. 154, ____ S.Ct. _____, 57 L.E.2d 667 (1978). It is the rule that in order for Franks to apply, a defendant must establish that the omitted or

false information be material to a determination of probable cause, State vs. Martin, 315 N.C. 667, 340 S.E.2d 326 (1986). It is clear from the Franks decision that a defendant, challenging such an affidavit, must establish that, absent the false information, probable cause would not exist.

In his motion to suppress, Defendant Barnes alleged that the inaccuracies in Detective Bishop's application were calculated to point directly to the automobile which he believed to be involved in the crime. By modifying the information which he provided, the Detective sought to insure that the magistrate would conclude that the particular car would probably have been involved in the episode. For example, although Ms. Baker told Detective Riggs that she saw a For Mustang on the night in question, Detective Bishop alleged in his application that she had

identified the car as being a "black subcompact". Detective Bishop further alleged that in his application that the woman gave him a description that was "very favorable" to the defendants. In fact, the description given to the detective was not at all similar to the defendants in that it described two clean shaven white men, neither of whom resembled the bearded defendants.

The face of the search warrant application, itself, when combined with the allegations and the affidavits accompanied the motion to suppress, established that Detective Bishop made false representations in the application and that he knew them to be false. Nevertheless, the trial court summarily ruled that the discrepancies between the application and the information known to the detective were immaterial.

The test of whether an omission or

modification in the facts on an application for a search warrant is material or whether, absent the omission or modification, probable cause still would have been found. E.g. State vs. Lockett, 232 Kan. 317, 654 P.2d 433 (1982); State vs. Doyle, 336 N.W.2d 247 (Minn. 1983); compare Schmid vs. State, 336 N.W.2d 247 (Alaska 1980). Clearly, these discrepancies were material. If Detective Bishop had accurately reflected the statement of Ms. Baker, that she had seen two clean shaven white men getting out of a Ford Mustang carrying a gas an, the magistrate, considering the application for a search warrant would not have issued a warrant for a Plymouth occupied by two bearded men on the evening of December 26.

CONCLUSION

Based upon the foregoing discussion, it is respectfully contended by the Petitioner that this Court issue its Writ of Certiorari to the Supreme Court of North Carolina for the purpose of allowing review of this cause.

This the 2ND day of September, 1993.

David F. Tamer
Counsel for Petitioner
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an attorney at law licensed to practice in the State of North Carolina, is an attorney for the Petitioner and is a person of such age and discretion as to be competent to serve process.

That on the 2ND day of September, 1993, he served a copy of the foregoing Writ of Certiorari by placing said copy in a first class post-paid envelope addressed as stated below, which is the last known address.

ADDRESSEE(S):

Solicitor General of the U.S.
One First Street NE
Washington, D.C. 20543

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David F. Tamer
Counsel for Petitioner

APPENDIX

IN THE SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA	)	
	)	
v.	)	
	)	
RONNIE DEAN BARNES	)	NO. 540A90-Forsyth
	)	
&	)	
	)	
CHARLES LEE LEMONS	)	

Appeal as of right pursuant to N.C.G.S. 7A-27(a) from judgments imposing sentences of life imprisonment entered by Rousseau, J., at the 26 February 1990 Criminal Session of Superior Court, Forsyth County, upon jury verdicts of guilty of first degree murder. The defendants' motions to bypass the Court of Appeals as to additional judgments were allowed 10 April 1991. Heard in the Supreme Court 9 December 1991.

The two defendants were tried for their lives for first degree murder. They were also tried for first degree burglary and attempted

first degree arson.

The evidence in the light most favorable to the State showed that on 26 December 1988, Bobby Douglas Winn, Jr. was living with his father in Winston-Salem. The elder Winn owned and operated Bobby Sue's Lounge, and he was at the lounge at approximately 6:30 p.m. on that date. He saw his son and the defendant Barnes at the lounge. The younger Winn left the lounge between 8:30 and 9:00 p.m. to go to his father's home to go to bed. Approximately thirty minutes later the two defendants left the lounge together.

At approximately 10:00 p.m., Mr. Winn discovered two tires on his truck had been punctured. He sent James Overby to the Winn residence to get an air compressor to inflate the tires. When Mr. Overby arrived at the Winn residence, he saw the truck of the younger Winn parked in the driveway. He

knocked on the door but received no answer. He then went to Mr. Winn's workshop, which was located on the premises, and retrieved the air compressor. Mr. Overby testified he did not notice anything wrong when he was at the Winn home.

As Mr. Winn and Mr. Overby were working on the car, they observed the two defendants in a black four door Plymouth Horizon with a confederate flag on the front. Lemons was driving. Mr. Winn then returned with Eddie Brewer to the Winn residence sometime between 10:30 and 11:00 p.m. to get two spare tires. Mr. Overby noticed the two defendants following Mr. Winn and Mr. Brewer in the Plymouth Horizon. Mr. Winn and Mr. Brewer saw nothing awry at the Winn residence at this time. Mr. Winn and Mr. Brewer returned to the lounge approximately thirty minutes after they had left it.

Kenneth Lee Willard testified he was working at the Parkway Texaco Station on 26 December 1988, and he sold gasoline to the defendant Barnes between 9:30 p.m. and 10:00 p.m. on that date. He lent the defendant Barnes a container for the gasoline and required him to make a deposit for the container. Barnes did not return the container to Mr. Willard for the refund of the deposit. Mr. Willard testified that the container was similar to State's exhibit #5.

Brenda Kay Baker testified that at approximately 11:00 p.m. on 26 December 1988, she was walking on Bryant Street close to the Winn residence when she saw a small black automobile with a confederate flag on the front. she saw the two defendants leave the vehicle and walk toward the Winn residence. One of them was carrying a container which was similar to State's exhibit # 5.

At approximately 12:15 a.m. on 27 December 1988, the elder Winn and his wife left Bobby Sue's Lounge and went to their home, arriving at approximately 12:30 a.m. Mr. Winn noticed that the door to his workshop was open. He started to close it and discovered the lock and the door were damaged He then discovered that his wife's automobile had been damaged. When he entered the house, the odor of gasoline "about knocked him down". He found the body of his son lying face down. He had been shot once and had been stabbed twenty-three times.

Mr. Winn found a gasoline container in his den which was introduced into evidence as State's exhibit #5. the door to Mr. Winn's office and the front door had been badly damaged. His safe was found in the front yard. Seventeen guns had been taken from the house.

Each defendant was found guilty of the three crimes for which he was tried. The jury recommended that each defendant be sentenced to life in prison for the first degree murder convictions, which was done. Each defendant was sentenced to forty years in prison for first degree burglary and ten years for attempted first degree arson. All sentences are to be served consecutively.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the State.

David F. Tamer for defendant-appellant Ronnie Dean Barnes; Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant Charles Lee Lemons.

WEBB, Justice.

Both defendants assign error to the admission into evidence of the results of a test conducted on blood samples taken from the automobile which was occupied by the defendants on the night of the murder. The

officers searched the vehicle pursuant to a search warrant. Each of the defendants made motions to suppress the evidence gathered as a result of the search and a hearing was held on these motions prior to trial.

The evidence at the hearing on the motions to suppress showed that the 1987 Plymouth Horizon was purchased in April 1987. The title certificate showed Pamela Rene Alderson and Robert Moyer Wilkes were the owners. These two persons were living together at the time. In July 1988, Ms. Alderson and Mr. Wilkes stopped living together and Ms. Alderson kept the automobile, but Mr. Wilkes refused to endorse the title to her. Ms. Alderson and the defendant Lemons commenced living together. Ms. Alderson allowed Lemons to drive the automobile to his workplace and Mr. Lemons left the key in the vehicle in order for the defendant Barnes to

drive it when needed. The defendant Lemons kept tools in the backseat of the car.

In the application for the search warrant, a detective filed an affidavit in which, among other things, he said an informant had told another detective that she had seen a black four door subcompact vehicle parked approximately one block from the Winn residence. The detective also said in the affidavit that the informant had told the other detective she saw two men with a plastic container leave the vehicle. The detective said the description of the two men given him by the informant was "very favorable" to the defendants. The evidence at the hearing showed that the informant told the detective that she had seen a black Mustang. She also told him that two clean shaven white men left the car carrying a gas can. The defendants argue that this evidence showed that the

detective changed the evidence in making the affidavit and if he had not done so, a search warrant would not have been issued.

At the end of the hearing, the court found facts consistent with the evidence as to the ownership and possession of the automobile. The court held that neither of the defendant had an expectation of privacy in the automobile and that they had no standing to contest the search.

The court found that if the defendants had standing to contest the search there was not a showing that the search warrant was falsely made by intentionally and knowingly misapplying the facts. The court overruled the defendants' motion to suppress the evidence.

The first question raised by this assignment of error is whether the defendants have standing to contest the search of the

vehicle. In order to have standing to contest a search, a defendant must have a legitimate expectation of privacy in the thing to be searched. Rakas vs. Illinois, 439 U.S. 128, 58 L.Ed.2d 387 (1978). It is hard to say the defendants had an expectation of privacy in the 1987 Plymouth Horizon. It was owned by defendant Lemons' girlfriend and another man. Lemons' girlfriend allowed him to drive the automobile to work but the title was never in his name. The defendant Barnes had even less interest in the vehicle. He was allowed to drive it at times by Lemons. Nevertheless, we do not decide this question on expectation of privacy in the automobile, we find no error in the issuance of the search warrant.

The defendants, relying on Franks vs. Delaware, 438 U.S. 154, 57 L.E.2d 667 (1978), contend that it was error not to grant them a hearing on the validity of the search warrant

after they had shown three different instances in which the officer who applied for the search warrant had falsified the affidavit. They say he said (1) the informant told another officer she had seen a black four door subcompact when she told him she had seen a black Mustang, (2) the informant gave the officer a description of the two men which was "very favorable" to the defendants when she actually told him the two men were clean shaven and the defendants had facial hair, and (3) the informant told him the two men had in their possession a plastic container when she had actually said they were carrying a gas can.

Franks holds that when a defendant makes allegations that an affidavit to support the issuance of a search warrant contains deliberate falsehood or reckless disregard for the truth and the affidavit would not be

sufficient to support the issuance of a search warrant without the false or reckless statements, the defendant is entitled to a hearing on his allegations. If he is successful in proving the charges, the evidence seized pursuant to the search warrant must be suppressed. N.C.G.S. Section 15A-978(a) provides for a hearing to test the good faith of an affiant in furnishing testimony for the issuance of a search warrant. State vs. Kramer, 45 N.C. App. 291, 262 S.E.2d 693, disc. rev. denied, 300 N.C. 200, 269 S.E.2d 627 (1980).

We hold that the evidence at the hearing did not show that the allegations in the affidavit rose to the level of a deliberate falsehood or reckless disregard of the truth. It also does not show the detective was not acting in good faith as defined in N.C.G.S. Section 15A-978(a). A "small, black four-door

subcompact vehicle" as described in the affidavit could be a description of a "black Ford Mustang" as described by the informant. A "plastic container" could be a description of a "white gas can". The detective could conclude that the description given by the informant of the men driving the vehicle was "very favorable" to the defendants although she said they were clean shaven when they had facial hair. We hold that the defendants have not shown that the affidavit filed to support the issuance of a search warrant contains deliberate falsehoods or shows a reckless disregard for the truth. This assignment of error is overruled.

. . .

For the reasons stated in this opinion, we find no error in either phase of the trial.

NO ERROR.

93-371

No. _____

Supreme Court, U.S.
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

Ronnie Dean Barnes,

Petitioner,

v.

State of North Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 15, and in the manner provided by Rules 24 and 33 of the Rules of the Supreme Court, the State of North Carolina responds to the Petition for Writ of Certiorari of Ronnie Dean Barnes and requests that this Court deny the relief sought by Petitioner on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

STATEMENT OF THE CASE

Petitioner was charged with first-degree murder, first-degree burglary and attempted arson in three separate indictments returned on 7 August 1989. The charges arose from the late night murder of Bobby Douglas Winn, Jr. at the residence of his father on 26 December 1988. The Petitioner's charges were joined with those of his codefendant, Charles Lee Lemons, and the two were tried at the 12 February 1990 Criminal Session of Superior Court, Forsyth County, North Carolina. On 21 February 1990, the jury returned guilty verdicts on each of the Petitioner's charges and following a sentencing hearing pursuant to N.C.Gen.Stat. §15A-2000, the Petitioner was sentenced to life in prison on the capital charge. Consecutive sentences of 40 and 10 years were imposed for the burglary and attempted arson convictions.

The Respondent's evidence at Petitioner's trial tended to show that between approximately 11:00 p.m. and midnight on 26 December 1988, the twenty-six year old victim was murdered at the home of his father, Bobby Douglas Winn, Sr. ("Mr. Winn"). At that time, the Winn residence was located in Winston-Salem, North Carolina, and was used by Mr. Winn as his dwelling house. Mr. Winn operated a dry wall business out of his home and the victim worked at a job for the business during the day of the murder. After work, the victim apparently went to Bobby Sue's Lounge, a business also owned by Mr. Winn and his wife, arriving there shortly after 4:30 p.m.

Shortly before 6:30 p.m., Mr. Winn left his house and traveled directly to Bobby Sue's Lounge. At that time, the front door of the residence was locked. Mr. Winn maintained an office in his home. A safe was kept in the office underneath a counter and was mounted on rails bolted to the floor. Like his front door,

when Mr. Winn left for the lounge, the door to the office was locked and the safe was in its proper place.

When Mr. Winn pulled into the parking lot of the lounge around 6:30 p.m., he saw his son talking with the Petitioner. Approximately one (1) year earlier, the victim and Petitioner had gotten into a fist fight. The fight resulted in Petitioner being barred from Bobby Sue's Lounge for a period of time.

Between 8:30 and 9:00 p.m., the younger Winn left the lounge to go home because he had to work the next day. When he left, both Petitioner and Lemons were still at the lounge. Approximately thirty minutes later, however, Petitioner and Lemons left together.

Around 10:00 p.m. that night, Carolyn Davis came into the lounge and told Mr. Winn that two tires on his truck were flat. Mr. Winn went out to inspect his 1989 Silverado pick-up and observed that the two tires on the side away from the lounge were flat. He then sent James Overby to the Winn residence to get an air compressor to inflate the tires. Overby went to Mr. Winn's residence and observed the victim's truck parked in the driveway. He knocked on the door but could not get anyone to answer. Overby then went around to Mr. Winn's workshop, got the air compressor out, loaded it in his van and relocked the workshop. At that time, the workshop door was not damaged.

When Overby returned to the lounge, he discovered the tires were punctured and would not inflate. While pumping the tires in the presence of Mr. Winn, Overby observed Petitioner and Lemons drive up in a black compact car with Lemons at the wheel. The car, a black four door Plymouth Horizon, had a confederate or rebel flag on the front.

Mr. Winn then went inside the lounge to get Eddie Brewer to drive him to the Winn residence to get some spare tires. It was between 10:30 and 11:00 p.m. when Mr. Winn and Brewer left for the residence which was only about three miles away. As they pulled out of the lounge parking lot, Overby observed the Petitioner and Lemons following Brewer and Winn in the Plymouth Horizon with Lemons driving.

At the residence, Mr. Winn and Brewer observed the victim's truck in the driveway. One tire was retrieved from the basement and another was removed from the victim's truck. The two then returned to the lounge their trip having taken approximately thirty minutes.

Kenneth Lee Willard testified that he was working at the Parkway Texaco on 26 December 1988 and saw Petitioner at the station between 9:30 and 10:00 p.m. The Petitioner wanted some gasoline and Willard sold him some in a container similar to Respondent's exhibit 5. The Petitioner gave Willard a $20 deposit as security for the container, however, to Willard's knowledge, Petitioner never returned the container.

Brenda Kay Baker testified that on 26 December 1988 she was living with her mother in Winston-Salem. Around 11:00 p.m., Baker was walking back to her mother's house with her sister returning from a store in the area. Near the Winn residence she saw a small black car with a confederate flag on the front parked next to the curb. Two white males she identified as Petitioner and Lemons got out of the car as she walked past. One of them had a container in hand identified by Baker as similar to Respondent's exhibit 5. One of the two yelled to her as she walked by. She turned around and looked but kept walking. When she turned around, she saw them crossing the street and walking in the direction of the Winn residence. The next day,

after hearing about the murder at the Winn residence, she called the police department and later reported what she had seen.

Around 12:15 a.m. on the morning of 27 December 1988, Mr. Winn and his wife left Bobby Sue's Lounge. Upon entering his driveway, he first noticed that the door on his workshop was open and he went over to close it. When he got to the workshop, he found the lock and door to the shop damaged.

Mr. Winn and his wife entered the house through the back kitchen door off the deck. He immediately noticed the hall light was on and the odor of gasoline "about knocked him down." The hall light was not on when he was by earlier to get the tires. In the den, Respondent's exhibit 5 was found on the floor. The door to the office and the front door of the residence were heavily damaged. Both doors had dead bolt locks and the frames of both were shattered in the area where the locking mechanism meets the frame. On the stairway leading to the second floor of the residence, Mr. Winn found his son face down between the first and second landings. There were several bullet holes in the walls around the victim. Later, after inspecting his office, Mr. Winn discovered that approximately seventeen guns were missing and his safe was in the front yard.

A sample of the wet den carpet was removed and sent to the State Bureau of Investigation ("SBI") Lab along with the container. Both were found to contain residual gasoline. A match which had been struck was found on the floor between the living room and the hallway.

On 4 January 1989, Detective Bishop of the Winston-Salem Police Department obtained a search warrant for a Plymouth Horizon registered to Pamela Alderson and her former boyfriend, Robert Wilkes. This was the same vehicle Petitioner and Lemons

were driving the night of the victim's murder. Lemons was living with Alderson at the time of the murder. SBI agent Jed Taub processed the car for the presence of blood using phenolphtalein and luminol. He got positive reactions for the presence of blood on the headlight switch knob, the handbrake lever and the front passenger seat of the car.

SBI Agent Lucy Milkes did an analysis of the blood found in the car and blood found on the safe handle in the house. She compared her findings with blood from jeans the victim was wearing and known blood samples of Petitioner, Lemons and Alderson. The blood on the victim's jeans and the blood found on the car seat were all ABO Type O. Moreover, all these samples were AK type 1 and ADA type 2-1 on the two enzyme tests the agent was able to perform. Agent Milkes testified that approximately 4% of North Carolina's population would have these blood grouping combinations.

The blood on the safe handle was consistent with that of the Petitioner. Forty-one percent of North Carolina's population would have blood grouping combinations consistent with the blood found on the safe handle.

Dr. James McCool performed an autopsy on the body of the victim. A single gunshot wound was observed on the victim's left arm. The projectile had proceeded through the arm into the victim's chest. Additionally, twenty-three (23) stab wounds were found on the body. In the opinion of Dr. McCool, the gunshot would not have caused immediate death. Based on the large volume of blood along the gunshot would tract and the relatively small amount of bleeding around the tissue of the stab wounds, Dr. McCool opined that the gunshot wound was inflicted first.

While neither Petitioner nor Lemons took the stand, both presented evidence through other witnesses in the form of an alibi.

REASONS WHY WRIT SHOULD NOT ISSUE

THE TRIAL COURT CORRECTLY CONCLUDED PETITIONER LACKED STANDING TO CONTEST THE SEARCH AND THE NORTH CAROLINA SUPREME COURT CORRECTLY CONCLUDED THE NO KNOWING AND INTENTIONAL FALSE STATEMENTS, NOR ONES MADE IN RECKLESS DISREGARD FOR THE TRUTH, WERE INCLUDED IN THE APPLICATION FOR THE SEARCH WARRANT.

Prior to trial, Petitioner filed a motion to suppress any evidence, and the results of tests performed thereon, seized during a search of a 1987 Plymouth Horizon pursuant to a search warrant. The Horizon was the vehicle Petitioner and Lemons were traveling in the night of the murder. Pertinent to this PETITION, the motion to suppress alleged the affiant included information in his warrant application which he either knew to be false or which he included in reckless disregard for the truth. After a hearing on Petitioner's motion, the trial court found (1) Petitioner lacked standing to contest the search and (2) that Petitioner had failed to make a sufficient showing that any of the statements were knowingly false or made in reckless disregard for the truth.

The North Carolina Supreme Court noted, without deciding the question, that it would be "hard to say [Petitioner] had an expectation of privacy in [the vehicle]." The court noted the

dearth of evidence to support Lemons' standing and then found "[Petitioner] had even less interest in the vehicle." *See*, PETITION Appendix at 35. Instead of resolving the standing issue, however, the North Carolina Supreme Court elected to decide the search question based on Petitioner's allegation that false statements were included in the affidavit. The court ultimately found the Petitioner had failed to show the allegations in the affidavit rose to the level of a deliberate falsehood or reckless disregard of the truth.

The Respondent contends the PETITION should be denied because (1) the trial court correctly found Petitioner did not have a reasonable expectation of privacy in the vehicle and (2) the North Carolina Supreme Court correctly found the allegations in the affidavit did not rise to the level of a deliberate falsehood or reckless disregard of the truth. The Respondent will address each of these contentions in turn.

A. PETITIONER DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE VEHICLE SEARCHED.

In order to claim the protection of the Fourth Amendment with respect to a governmental search, the person claiming the protection must have a legally sufficient interest in the place searched. The person must have a reasonable expectation of privacy. *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978). Legitimate expectations of privacy are determined by references to concepts of real or personal property law or to understandings that are recognized and permitted by society. *Id*. 439 U.S. at 143. The ultimate question, therefore, is whether one's claim to privacy from governmental intrusion is

reasonable in light of all the surrounding circumstances. *Id.* 439 U.S. at 152.

Turning to the facts developed below, it is apparent Petitioner had no reasonable expectation of privacy in the automobile searched. Pam Alderson, the live-in girlfriend of Petitioner's codefendant, Charles Lee Lemons, owned the vehicle jointly with Robert Wilkes, Alderson's former boyfriend. Wilkes had refused to endorse the title over to Alderson. Although Alderson allowed Lemons to drive the car to work, Petitioner's only interest in the vehicle was that Lemons would leave the keys in the vehicle at job sites in order for Petitioner to drive the vehicle. This was done by Lemons notwithstanding the fact that Petitioner's license to drive had been revoked.

Alderson testified she paid the insurance premiums on the vehicle. While Alderson considered contributions towards the insurance premiums by Lemons to be loans, Petitioner contributed nothing towards the insurance or loan payments on the vehicle. The vehicle was repossessed ten days after the victim was murdered.

Petitioner did not have his own key to the vehicle although Alderson and Lemons did leave a key in the vehicle. When the vehicle was seized, it was parked in Alderson's driveway and there was no showing it had been entrusted to Petitioner at that particular time.

The reasonableness of one's expectation of privacy is determined by such factors as the precautions he takes to maintain privacy, the way he uses a location, the history of the Fourth Amendment, the property interest involved and society's recognition of customary behavior. *Id.* 439 U.S. at 152-153. Notwithstanding his lack of ownership, Petitioner contributed

nothing towards maintaining the vehicle and either did not know or did not care that it could be repossessed at almost any time. The Petitioner took no precautions to maintain privacy in the vehicle. He apparently consented to the practice of leaving a key in the vehicle at all times even though he allegedly kept some tools in the vehicle. By driving around with a revoked driver's license, Petitioner knowingly operated the vehicle in violation of the law and was constantly inviting his arrest and the possible seizure of the vehicle incident to arrest. Petitioner's permission to drive Alderson's vehicle was obtained vicariously through Lemons. Permission to use the vehicle at work did not provide Petitioner with a continuous expectation of privacy in the vehicle during times when it was parked in Alderson's driveway and was under her immediate control. Quite simply, Petitioner's interest in the vehicle was not one society would recognize as attended by a reasonable expectation of privacy. Petitioner did not have a legally sufficient interest in the vehicle to claim the protection of the Fourth Amendment.

B. PETITIONER'S ALLEGATION THAT FALSE STATEMENTS KNOWINGLY AND INTENTIONALLY, OR WITH RECKLESS DISREGARD FOR THE TRUTH, WERE INCLUDED IN THE WARRANT AFFIDAVIT WAS INSUFFICIENT TO REQUIRE A HEARING ON THE ISSUE.

Relying on *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978), Petitioner contends the trial court should have conducted a hearing on his claim that false statements were included in the warrant affidavit. These alleged false

statements included: (1) that a confidential source had observed "a small, black four-door subcompact vehicle" parked about a block from the Winn residence the night of the murder; (2) that the two white males who got out of this vehicle "had a plastic container in their possession;" and (3) that the informant "gave descriptions of the two white males that are very favorable" of Petitioner and Lemons. Petitioner contends these statements were false because: (1) the informant, Baker, had described the vehicle she saw the white males get out of as a "black Ford Mustang"; (2) Baker told law enforcement officers the occupants of the vehicle "had a white gas can"; and (3) Baker described one of the occupants as being clean shaven and the other as sporting a moustache when, at the time of the murders, both suspects allegedly had facial hair.

The North Carolina Supreme Court correctly concluded defendant's allegations were insufficient to show that false statements were knowingly and intentionally, or with reckless disregard for the truth, included in the warrant affidavit. The three statements above are clearly distinguishable from the allegedly false information included in the affidavit in *Franks*. The Petitioner in *Franks* claimed that critical information establishing probable cause was falsely included in the warrant in his case. Although the affiant had stated this information came from interviews with named sources, Franks had substantial evidence to show the interviews never took place. By contrast, the North Carolina Supreme Court noted that the statements Petitioner attacks were all based on evidence actually received by the affiant and were not falsely or recklessly reported in the warrant affidavit. A black Ford Mustang is a black subcompact car. A plastic container can be a gas can and, notwithstanding the facial hair issue, the affiant could reasonably conclude Baker's description was favorable of the suspects.

In *Franks*, this Court noted that a sensible threshold showing was required to prevent the veracity challenge rule announced therein from resulting in new large-scale commitments of judicial resources to resolve *Franks* claims. To prevent misuse of veracity hearings, the Court held that a defendant was required to make a substantial preliminary showing that false or reckless statements were intentionally included in the warrant affidavit. Petitioner did not meet this burden and the decision below is correct.

CONCLUSION

Based on Petitioner's (1) lack of a reasonable expectation of privacy in the vehicle searched and (2) his failure to make a substantial preliminary showing that false information knowingly and intentionally, or with reckless disregard for the truth, was included in the warrant affidavit, the courts below correctly resolved Petitioner's Fourth Amendment claim and this PETITION should be denied.

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